IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**Criminal No. DR-19-CR-01512-AM**
	§	
JULIO CESAR TENORIO,	§	
Defendant.	§	

Pending before the Court is Defendant's Motion to Suppress (ECF No. 20). The Court has carefully reviewed the parties' briefings (ECF Nos. 20-21), as well as evidence and arguments presented at a hearing held before the Court. Having considered all relevant facts and legal arguments, the Court has determined that the Defendant's Motion to Suppress should be **DENIED**.

I. FACTUAL FINDINGS

On June 13, 2019, at approximately 7:40 pm, the Defendant attempted to enter Mexico via the Del Rio, Texas Port of Entry. At the outbound primary inspection area, he made a negative declarations of being in possession of drugs, firearms, or more than $10,000 to United States Customs and Border Protection (CBP) Supervisory Officer Eric Medina, although he did declare he possessed $3,200 in United States currency. Also, present at the time of the Defendant's declarations were Officers Jose Govea, Jose Luis Garza, Juan G. Garza, and Oscar Jimenez.

After making the negative declarations, the officers saw the Defendant begin to act nervously, displaying a facial twitch. At this time, canine agent Hedes[1] inspected the vehicle showed "some interest," but did not make a positive alert. The officers then referred the Defendant to secondary inspection at which time the Defendant was given the opportunity to revise his earlier statement. He repeated his prior claim that he was carrying only $3,200 in cash.

[1] Hedes is trained in the detection of currency, weapons, and ammunition.

While the officers asked the Defendant to step out of his car for further questioning, Hedes conducted an inspection of the outside of the vehicle. Throughout the questioning, Officer Govea observed the Defendant's continued nervous behavior, in particular, his hands were trembling, he started smoking, and avoided eye contact with the officers.

In the course of his inspection, the canine agent made two positive alerts—one to the vehicle and the other to the Defendant's leg area. Based on these positive alerts, the officers searched of the car and the Defendant's person. When they searched the car, the officers found a GPS tracker hidden behind the wheel. At this point, Officer Medina made the decision that the Defendant and his car should be moved to the port of entry's inspection station where CBP could do a more thorough inspection of both car and owner. Prior to moving the Defendant, Officer Medina conducted a pat-down search for weapons. During the pat-down search, Officer Jimenez noticed the Defendant looking furtively at his boots, so Officer Jimenez asked the Defendant to lift his pant leg, which revealed black plastic bags stuffed into the Defendant's boots. The officers later established that the bags contained an additional $19,140 making a total of $22,340.

After concluding a full search of the vehicle, the Customs officers contacted Homeland Security Investigations (HSI) to take custody of the Defendant for further questioning. Before HSI Agent Robert Cannon began the interrogation, the Defendant received both oral and written *Miranda* warnings. He proceeded to waive his rights and speak with Agent Cannon regarding the provenance of the money.

While Agent Cannon conducted this interrogation, another HSI officer conducted a "phone dump" of the Defendant's cell phone. The Defendant had not given consent to the authorities to search his phone. Facts as to the technique or the scope of the phone search were not developed in the testimony provided. However, the phone search was handled separately from the

interrogation, and Agent Cannon did not receive any information about the fruits of the phone search prior or during the interrogation.

II. LEGAL STANDARD

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures." U.S. CONST. AMEND. IV. Thus, the "ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 573 U.S. 373, 381-82 (2014). Generally, reasonableness requires obtaining a warrant, unless however the search is reasonable because it falls within a specific exception to the warrant requirement. *Id.* at 382 (*citing Kentucky v. King*, 131 S.Ct. 1849, 1856–57 (2011). The border search is one such exception. "[S]earches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey*, 431 U.S. 606, 616 (1977). The Government's authority to conduct warrantless searches at the border is rooted in the need for the "United States, as sovereign, to protect . . . its territorial integrity." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Furthermore, as the Government's authority is at its "zenith" at the border, the individual's "expectation of privacy is less at the border than in the interior" tilting the balance of interests in favor of the Government. *United States v. Flores-Montano*, 541 U.S. 149,152 (2004). This holds true whether individuals are entering or leaving our borders. *United States v. Odutayo*, 406 F. 3d 386, 392 (5th Cir. 2005); *see also United States v. Berisha* 925 F.2d 791, 795 (9th Cir. 1991).

III. CONCLUSIONS OF LAW

In his Motion, the Defendant seeks to suppress "any and all evidence discovered in the search . . . as well as his statements following his arrest as 'fruit of the poisonous tree.'" (ECF No.

20 at 1). Specifically, the Defendant argues that the CBP agents lacked probable cause to refer him to secondary inspection prior to the physical search, and as such, all evidence gathered thereafter was ill-gotten. Additionally, the Defendant asks the Court to extend the limitations on warrantless phones searches imposed by *Riley* to the kind of border search conducted in this case.

First, the Court finds that the stop in its entirety did not violate the Fourth Amendment because the Customs agents acted within their authority to initiate searches without suspicion, as provided by the border search exception. Alternatively, the initial stop, the referral to secondary inspection, and the search of the car and the Defendant were valid because all actions taken were rooted in reasonable suspicion. Similarly, the Court need not add to the warren of opinions evaluating the precise applicability of *Riley* to the border search exception because the facts show HSI had adequate cause to analyze the Defendant's phone without a warrant. Moreover, information taken from the phone was not known by the agents prior to any searches of the car, the Defendant, or the taking of the Defendant's statement. The evidence seized from the car or the Defendant was not the product of any phone search, and thus not "fruit of the poisonous tree" from any search of the phone.

*A. Secondary Inspection and Post-*Miranda *Statements*

1. Secondary Inspection

The Defendant contends that the search of his boots was unconstitutional because it was the result of a suspicionless and unlawfully prolonged stop (ECF No. 20 at 5). While individualized suspicion and duration of a stop are relevant factors in determining the validity of stops conducted at fixed and roving border checkpoints, they are not at a port of entry. The Supreme Court has made clear there is a long-standing history of protecting the Executive's "plenary authority to conduct routine searches and seizures at the border, without probable cause

or warrant." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Reasonable suspicion at a port of entry is only required if an individual is detained "beyond the scope of a routine customs search and inspection." *Id.* 473 U.S. at 541. A 'routine search' is one that does not "seriously invade a traveler's privacy." *United States v. Cardenas*, 9 F.3d 1139, 1148 n. 3 (5th Cir. 1993). When searching the physical person, the Fifth Circuit has recognized simple frisks, removal of shoes, emptying of pockets and wallets, and lifting the hem of an untucked shirt[2] all to fall within a routine search which "require[s] no justification other than the person's decision to cross our national border." *United States v. Sandler*, 644 F. 2d 1163, 1167–69 (5th Cir. 1981).

The facts in this case clearly fit within the parameters of a routine border search. The Defendant was stopped at the Del Rio port of entry and was thus subject to any routine search method deemed appropriate. Here, the officers' actions were minimally invasive, and direct physical contact was limited to the pat-down search for weapons. His only potential bodily exposure was when the Officers asked him to lift his pant leg to gain a better view of his boots—a far cry from invasive procedures such as a strip search[3] or body scan[4] which would have required reasonable suspicion. All of the officers' actions fall comfortably within recognized standards for a routine border search. Thus, as a routine border search, the officers "required no justification" and acted lawfully. *Id.*

Alternatively, the Court finds that there was reasonable suspicion to support the Defendant's detention and physical search. A reasonable suspicion is a "particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v.*

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[2] United States v. Starr, 465 Fed. Appx 343, 343 (5th Cir. 2012).
[3] United States v. Uricoechea-Casallas, 946 F.2d 162, 166 (1st Cir.1991) (requiring a "reasonable suspicion" standard before conducting a strip search at the border).
[4] United States v. Vega–Barvo, 729 F.2d 1341, 1349 (11th Cir.1984) (holding that an x-ray was a nonroutine border search).

Cortez, 449 U.S. 411, 417–18 (1981). The law enforcement officers must be able to identify "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The Court finds there was reasonable suspicion to suspect the Defendant of criminal activity from the outset and factors continued to accumulate at each step in the process. First, the Defendant exhibited nervous behavior and the onset of a facial twitch when asked to make the first declaration—giving rise to the need for a secondary inspection. Next, leading up to the secondary inspection and declaration, the Defendant's nervous ticks became more acute, he began avoiding eye contact, had a sudden need to smoke, and his hands were shaking which justified further questioning and continued use of the canine agent. Then the canine agent made positive alerts to the vehicle and the Defendant's leg area indicating the presence of guns, currency, or munitions. Finally, during the pat-down, the Defendant's own conduct drew more attention to the money's hiding place. The officers simply had to follow the clues to the rest of the money. When considered in their totality, there were ample facts to support reasonable suspicion.

2. Post-*Miranda* Statements

The Defendant's argument for suppressing his statements to Agent Cannon flows from the same logic. He does not contest that he knowingly waived his Fifth Amendment rights, but rather, he contends that because the interrogation was contingent on the improper search and seizure of the additional $19,140, all his statements are the fruit of the poisonous tree. (ECF No. 20 at 6.)

Fruit of the poisonous tree is an exclusionary rule doctrine meant to protect against Fourth Amendment violations by law enforcement, *Wong Sun v. United States*, 371 U.S. 471, 485 (1963), and cannot be circumvented even if the resulting statement meets the voluntariness requirements under the Fifth Amendment. *Brown v. Illinois*, 422 U.S. 590, 601 (1975) ("[E]ven if the statements

made in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains."). The Government bears the burden of establishing that the means used to obtain the evidence adheres to the Fourth Amendment or falls within a well-recognized exception. In accordance with the previous discussion, the Court finds the search and arrest precipitating the Defendant's statements were valid under the border search exception to the Fourth Amendment and therefore, any statements derived from the original searches and seizures were not the fruit of the poisonous tree.

B. Phone Search

Finally, the Defendant contends that the Government's search of his phone was an illegal warrantless search incident to arrest because such searches have been held unconstitutional by the Supreme Court in *Riley v. California.* (ECF No. 20 at 7.)

In *Riley*, the Supreme Court held that the police may not use the search incident to arrest exception as a basis to search digital information on an individual's cell phone without a warrant. *Riley v. California*, 573 U.S. 373 (2014). The Supreme Court's reasoning traced the historical purposes for the search incident to arrest exception and weighed it against individuals' interest in protecting the potentially sensitive and vast amount of personal data accessible through a modern smartphone. *Id.* at 393-96.

First, the Court rejects the Defendant's premise that his arrest abrogates the Government's authority to conduct a border search. The Fifth Circuit has recognized that border searches may occur after the individual is arrested. *See United States v. Bates*, 526 F.2d 966, 966-67 (5th Cir. 1976). Consequently, the holding in *Riley* is not directly on point; the precedential value of *Riley* was narrow and pertained only to the search incident to arrest exception. In fact, Justice Roberts made clear in his opinion for the majority that "even though the search incident to arrest exception

does not apply to cell phones, other case specific exceptions may justify warrantless searches pursuant to other Fourth Amendment exceptions. *Id.* at 401-02. Nevertheless, the principles the Supreme Court wrestled with are still relevant to the case at hand.

At the heart of the issue is the extent to which evolving privacy interests arising from the pervasiveness of smartphones fundamentally change the reasonableness calculus at the border. However, since *Riley*, neither the Supreme Court nor the Fifth Circuit has taken up this question, but courts in other circuits have. *See e.g. United States v. Cano*, 934 F.3d 1002, 1016 (9th Cir. 2019) (requiring a showing of reasonable suspicion of an ongoing crime before conducting a forensic phone search); *United States v. Kolsuz*, 890 F.3d 133, 137 (4th Cir. 2018) (holding forensic phone searches sufficiently intrusive to be considered nonroutine require reasonable suspicion of past or future criminal activity); *United States v. Touset*, 890 F. 3d 1227 (11th Cir. 2018) (finding that, like with other property, there is no requirement for reasonable suspicion for nonroutine phone searches."); *also see United States v. Kim*, 103 F.Supp.3d 32 (D.C.C. 2015) (finding the government lacked reasonable suspicion of an ongoing to search the defendant's laptop). The controversies in many of these cases turned on the nature of, or extent of, the digital searches thereby adapting the routine versus nonroutine distinction established in *Montoya de Hernandez* to the latest conception of digital invasiveness as expounded by *Riley*.

The limited facts offered in this case regarding the methods and scope of the phone dump make it difficult to rely on any of these decisions as wholly persuasive. However, taken collectively, they do provide important guidance. While the courts vary with respect to the need for suspicion depending on the nature of the digital search, all agree that the individual interests implicated by the rise of smartphones do not countervail the Government's "paramount interest in protecting . . . its territorial integrity." *Touset*, 890 F.3d at 1235 (quoting *Flores Montano*, 541

U.S., at 152). The balance still weighs in favor of the Government, so at most, law enforcement would have to provide particularized reasonable suspicion before conducting a cell phone search at the border. In short, there are no circumstances in which law enforcement officers conducting a border stop would need to first obtain a warrant. *See e.g. Kolsuz*, 890 F. 3d at 140-41 ("no reported case has held a border search to [the probable cause] standard").

Assuming, without deciding, that HSI would have needed reasonable suspicion to conduct the phone dump, the Court finds that the Government had more than reasonable suspicion to believe that the Defendant was attempting to engage in ongoing criminal activity. When HSI agents received the phone from the Customs officers they would have known that:

(i) The defendant lied twice on his declarations regarding how much money he was taking out of the country;

(ii) his anxious behavior throughout the preliminary and secondary inspections;

(iii) the discovery of a GPS tracker in the car suggesting that other parties were keeping tabs on him; and; [5]

(iv) the location where the Defendant sought to smuggle the money out of the United States.

In their totality, these facts form the basis for reasonable suspicion to indicate "a crime may be afoot." *Terry* 392 U.S. at 30. The Government agents suspected that information on the phone could corroborate and expand upon any information the Defendant may give during his interrogation regarding the cash smuggling and other related ongoing criminal activity. Thus, before HSI agents conducted the phone dump it had a "particularized and objective basis" for proceeding with the search, so to the degree that reasonable suspicion may be required, the phone search was valid.

[5] This was, in fact, borne out. At the hearing, the Defendant entered a series of photographs into evidence which were taken from afar by an unknown person, throughout the secondary inspection at the Port of Entry.

The Court finds that the search of the Defendant's phone was based on reasonable suspicion and information taken from the phone may be used as evidence, if the parties should choose to do so.

III. CONCLUSION

For these foregoing reasons, the Defendant's Motion to Suppress is hereby **DENIED** in its entirety.

SIGNED and ENTERED on this 5th day of December, 2019.

ALIA MOSES
United States District Judge